UN-Principles and International Environmental Law

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I. Principles in General/UN-Principles/ Environmental Principles

"Principles in general" are not an easy issue to deal with; almost like an intellectual refugee they are frequently used by doctrine in order to overcome uncertainties regarding the legal value of numerous texts. The notion of principle is highly appreciated by politicians and others, because they believe, with some naiveté, that principles constitute a stronger and much more binding type of rule. Thus "principles" serve twofold, even contradictory, purposes.

In order to elaborate this notion literature is still helpful: *Seidl-Hohenveldern* spoke of principles as "soft" codes and was of the view that a State could not accept a principle and act in a way contrary to it, unless a fundamental change of circumstances had occurred;[1] from this view one should infer the idea of acceptance and understanding of the close link to rules as such. *Teclaff* complained that general principles like the notions of good neighbourliness, and abuse of rights lack sufficient precision to permit their application with any degree of confidence in concrete cases.[2] Even the principles contained in the *Trail Smelter* arbitration require according to *Rauschning* further development and some anchoring in international legal norms in order to produce concrete le-

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1 I. Seidl-Hohenveldern, "International Economic Soft Law", *RdC* 163 (1979), 169 et seq.

2 L. Teclaff, "The Impact of Environmental Concern on the Development of International Law", in: L. A. Teclaff, *International Environmental Law*, 1974, 229.

gal duties.[3] *Chinkin* had a much broader approach: In his idea of "soft law" instruments, statements of principles prepared by individuals in a non-governmental capacity are also included. He also referred to a problematic claim, namely that such "soft law" principles somewhat automatically have come to represent customary international law; but he rejected this view as it did not take into account the need of State practice and *opinio iuris*.[4] *Kiss-Shelton* linked the adoption of principles to the progressive development of international law; but as professional lawyers they agree that such principles cannot stand alone but need transformation into binding obligations in order to play their role in international life.[5] *Szasz*, with his life-long experience in law-making in the UN context, stressed the important role of legislative declarations as they may be precursors to and guide a later treaty-making process and are designed to influence the conduct of states directly. He even expected that such declarations may catalyze the creation of customary law by expressing in normative terms certain principles whose general acceptance is already in the air.[6] The German doctrine (*Lagoni*) highlighted at an early phase the distinction between non-binding principles, contained in declarations, recommendations etc., principles that claim to offer solutions for certain problems, and binding principles that have been formed in the context of customary law and have already been mentioned in one or the other agreement.[7] Japanese doctrine (*Ida*) has followed a more cautious line: the repetition and cross-referencing of principles in many different resolutions certainly increases their weight well beyond simple facts, but their real normative value depends on the form. Is it a pseudo-treaty such as the Charter of Economic Rights and Duties of States or the Helsinki Final Act (CSCE)? Factors such as the circumstances of adoption, results of voting, explanations of vote, reservations etc. have to be taken into account.[8] Finally it should not be neglected that such "soft" law principles might not only emerge in global and formal political bodies: such principles have already been elaborated

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3 D. Rauschning, "Umweltschutz als Problem des Völkerrechts", *EA* 27 (1972), 567 et seq., (569).

4 C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", *ICLQ* 38 (1989), 851 et seq.

5 A. Kiss, D. Shelton, "Systems Analysis of International Law: A Methodological Inquiry", *NYIL* 17 (1986), 45 et seq., (72).

6 P. Szasz, "International Norm-making", in: E. Brown-Weiss, *Environmental Change and International Law*, 1992, 68.

7 R. Lagoni, "Umweltvölkerrecht, Anmerkungen zur Entwicklung eines Rechtsgebietes", in: W. Thieme, *Umweltschutz im Recht*, 1988, 244.

8 R. Ida, "International Lawmaking Process in Transition? A Comparative and Critical Analysis of Recent International Norm-Making Process", in: M. Young, Y. Iwasawa (eds), *Trilateral Perspectives on International Legal Issues, Relevance of Domestic Law and Policy*, 1996, 35.

in the context of the OECD or in the framework of the ILA or the World Commission on Environment and Development — the so-called Brundtland Commission.[9] This author himself has tried to clearly distinguish between rules and principles.

Principles, even if they are part of the law, are norms of a general nature which give guidance to state behaviour, but are not directly applicable; the violation of such principles cannot be pursued in international courts unless they are made operational by means of more concrete norms.[10] But whatever definition is chosen, whatever distinction one applies, nobody can deny that principles are important tools, but that their normativity in many cases remains a grey-zone phenomenon that policy-makers and lawyers have to live with.

Turning now to *"UN principles"* in the narrow sense we would rely less on literature but on the facts themselves: When we talk about UN principles we do not think only about principles that affect the United Nations and its members as such, but also principles that emanate from UN bodies. At the top of the list should be *inter alia* the following treaty-based principles:[11]

- Charter of the United Nations (Article 2)
- Statute of the ICJ
- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies — Outer Space Treaty
- UN Framework Convention on Climate Change.

The normative value of these principles is established beyond any doubt. As some of them remain relatively vague the question of implementation and interpretation still exists; but in this context the only resort is the Vienna Convention on the Law of Treaties (good faith, ordinary meaning, object and purpose, context etc.).[12]

If we look at the so-called soft-law principles we would especially mention beyond whatever texts have been quoted above, principles contained in several important declarations: the so-called Friendly Re-

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9 P.M. Dupuy, "Soft Law and the International Law of the Environment", *Mich.J.Int'lL.* 12 (1990), 420 et seq., (423), as for the Brundtland-Report see, *Our Common Future: Report of the World Commission on Environment and Development*, 348 et seq.

10 W. Lang, "The United Nations and International Environmental Law", International Geneva Yearbook IX (1995), 52.

11 E. Suy, *Corpus Juris Gentium. A Collection of Basic Texts on Modern Interstate Relations*, 1996, 13 et seq., 226 et seq., 319 et seq.

12 Suy, see above, 99 et seq., (Art. 31-33).

lations Declaration of 1970[13] or the World Charter for Nature.[14] It may be surprising that some of these solemn declarations that have been adopted since the mid-seventies try to carefully avoid the notion of "principle", probably because this notion had previously been used much too much; as an exception one might consider the area of environment, which will be dealt with hereinafter.

Before analyzing and comparing in detail the four texts which constitute the core of this study (the Stockholm Declaration of the UN Conference on the Human Environment, the Rio Declaration on Environment and Development, the UNEP-Principles, and the CSD-Principles), literature on the "environmental principles" will be reviewed in order to better evaluate the catalogues following later on.

One *caveat* should precede this effort to identify *"environmental principles"* in their narrow meaning: In some publications one talks about these principles without giving a real definition; this already happened in a UNEP-sponsored booklet, in which the authors listed broad categories (duty to cooperate, duty to avoid harm, duty to compensate for harm) but stated only that such principles and concepts "may also be emerging as customary international law".[15] Although a presentation of literature cannot be exhaustive, a brief overview may be helpful. In earlier publications frequent reference had been made to so-called natural law principles such as *"sic utere tuo ut alienum non laedas"* or to "equitable utilization".[16] The first of these principles was also identified as a private law principle of Roman origin, which had already been qualified by the ILA in 1955 as a general principle of law; to this was added the duty of due diligence, which was understood as the obligation of a state to use its best endeavours that its territory is not used to damage other territories (see *Trail Smelter Dictum*).[17] A benchmark function had been assigned to the 1974 OECD Principles Concerning Transfrontier Pollution, which contained duties on early warning in case of environmental accidents, a duty from which weak bridges were built towards strict liability.[18] In the early German speaking doctrine reference was made to a *"Prinzipientrias"*, which was supposed to comprise a principle of precaution, a principle of compensation as a conse-

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13 A/RES/2625 (XXV) of 24 October 1970; reprinted in: Suy, see note 11, 45 et seq.

14 H. Hohmann, *Basic Documents of International Environmental Law*, 1992, Vol. 1, 64 et seq.

15 *Concepts and Principles of International Environmental Law: An Introduction*, UNEP 1994, 2, 15–33.

16 E. Brown, "International Environmental Law and the Natural Law", in: D. Deener, *International Law of the Environment*, 1973, 8.

17 J. Ballenegger, *La Pollution en Droit International*, 1975, 67 et seq.

18 J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization*, 1979, 161 et seq.

quence of the causal link between damage and its origins, and a principle of cooperation, which was mainly oriented towards the relations between the state and civil society.[19]

French scholars distinguished by the mid-eighties between "*principes directeurs*" and "*principes inspirateurs*". Among the former they included environmental impact assessment, information and consultation, early warning in case of accidents, non-discrimination and equal treatment. In the second group were mentioned sovereignty in exploiting one's natural resources, solidarity and cooperation, equitable utilization of common resources, safeguarding of the common heritage of mankind. This catalogue is a clear step towards the environmental principles of the early nineties.[20] The last step towards these principles was, apart from the report of the Brundtland Commission, the so-called Declaration of The Hague, 1989, in which were mainly assembled principles of an institutional nature focusing on issues such as effective implementation and compliance.[21] Legal science also recognized that principles containing the environmental duties of states had become less and less precise: such principles were mainly those contained in the Convention on Long-Range Transboundary Air Pollution of 1979 or the Vienna Convention for the Protection of the Ozone Layer of 1985; here the formal distinction between treaty-based and other principles had already become less and less important.[22] A specific case is the analysis of the "principle of precautionary action" on the basis of internal German law and concrete action in the North Sea and conventions covering this marine area as well as EC treaties under the Single European Act.[23] Defining the legal nature of environmental principles remained a challenge to lawyers and negotiators. This is especially true of the "Polluter Pays Principle", which in the light of its OECD-history could not deny its economic origin, and continued to be a major challenge, although it has entered several of the more recent catalogues.[24] Somehow bridging the

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19 C. Storm, *Umweltrecht, Handbuch des Umweltrechts*, 1987, 746 et seq.

20 P.M. Dupuy, "Le Droit International de l'Environnement et la Souveraineté des Etats", The Future of the International Law of the Environment, Hague Academy Workshop 1984, 29 et seq., (38/39).

21 Ph. Sands, "The Environment, Community and International Law", *Harv. Int'lL.J.* 30 (1989), 393 et seq., (417).

22 A. Kiss, "Nouvelles Tendances en Droit International de l'Environnement", *GYIL* 32 (1989), 241 et seq., (261); see also Kiss in UNITAR, Course 1 (Programme of Training for the Application of Environmental Law), 1997, 71 et seq.

23 L. Gündling, "Status in International Law of the Principle of Precautionary Action", *Journal of Estuaire and Coastal Law* (Special Issue on the North Sea), 1990, 28.

24 H. Smets, "Le Principe Pollueur Payeur, un Principe Economique Erigé en Principe de Droit de l'Environnement", *RGDIP* 97 (1993), 339 et seq.

gap between the various groups of principles made it an effort to come back to "soft law", in which were identified again two groups, namely "codes of conduct" and "soft principles": the latter ones were either seen as frames of reference for future agreements or as part of the crystallization process producing customary law.[25] Here clearly emerges a double function of environmental principles. They may lead to treaty law or to customary law. In which direction they may move cannot be decided in a general way. This will occur rather on a case-by-case-basis.

A consultation on sustainable development held at Windsor Castle in 1993 also tried to throw more light on the notion of principles. Such principles were called the "legal and philosophical basis" for the move towards sustainable development. It was also said, that legal and other implications may be drawn from a text like the Rio Declaration, that they may provide a basis for the negotiation of future international legal instruments and could also facilitate verification and compliance-control. Their moral force and mixed legal status were at a central concern of participants in that consultation. Some of the Rio principles were understood as being clearly based on customary law, others were considered as new and emerging, and still others were only identified as inspirational, i.e. statements of future intent.[26] French doctrine now draws important conclusions from a comparative reading of the 1997 decision of the ICJ (Legality of the Threat or Use of Nuclear Weapons), the new Convention on the Non-Navigational Uses of International Water Courses and the principles listed in one of the catalogues mentioned below (UNEP-principles). As regards International Environmental Law its future appears to be mainly influenced by "general rules" having legal force and only later on by inspirational principles. Looking back along this doctrinal trail one becomes aware that we have moved a long way from old Roman law principles of a private law character to modern principles of a highly political nature. If one considers the Stockholm Declaration's most important principle (Principle 21), it is a subject of reflection as regards its legal nature, whereas the Rio Declaration contains several principles that can be discussed in the light of their real or potential legal value.[27] One could very well share the view that the soft obligations of the Rio Declaration, initially only formulated as programmatic statements *de lege ferenda*, will increasingly take on legal status, will inspire the creation of new customary law and will become a standard text providing interpretative aid for a large number of actual

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25 J. Brunnée, "Emerging International Processes-Towards Effective International Environmental Law: Trends and Developments", in: St. Kennett (ed.), *Law and Process in Environmental Management*, 1993, 229 et seq.

26 Report of a Consultation on Sustainable Development: The Challenge to Law, *RECIEL* 2 (1993), r 1.

27 P.M. Dupuy, "Où en est le Droit International de l'Environnement à la Fin du Siècle", *RGDIP* 101 (1997), 873 et seq., (873).

conventions.[28] As a matter of fact many general lessons could be learned from this process of crystallizing political statements into legal duties.

Another bridge could be built to the next section by means of this final remark. This concerns German-speaking or German-origin literature and the high importance it assigns to "principles/*Grundsätze*" in the development of International Environmental Law. Among the scholars concerned special mention should be made of *Wildhaber*, who listed at the top of his catalogue the principle of limited territorial sovereignty, followed *inter alia* by those of good neighbourliness, good faith etc.[29] To this article has to be added a major volume of *Erbguth*, who knew of three important principles, namely precaution/prevention, compensation for damage and cooperation.[30] Another scholar was *Lagoni*, who distinguished, as many others before him, between non-binding principles and legally-binding principles of International Environmental Law.[31] Not to be overlooked should be the contribution of *Wolfrum*, who gave a broad overview, that ranges from principles of substance such as sovereignty, territorial integrity, good neighbourliness to procedural principles such as non-discrimination or the equal treatment of citizens.[32]

As this author has organized a workshop on sustainable development and international law a cross-reference to a well-known British scholar may conclude this part. *Sands* was writing on emerging legal principles. He spent considerable effort on defining the function and nature of principles. Like others, he distinguished between principles reflecting customary law and principles reflecting only an emerging rule. Of special interest are the factors which he used to define the legal effect of any principle: textual context, specificity of its drafting, circumstances in which it is relied upon, its use in treaties, reliance on it by international tribunals. As regards the impact of such principles Sands saw a broad spectrum. At the one end there is only guidance in the implementation of substantive rules, on the other there is an actionable right in itself. For the remainder he followed to some extent the conclusions of the aforementioned Windsor Castle consultation. For him the

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28 E. Riedel, "Change of Paradigm in International Environmental Law", *Law and State* 57 (1998), 34.

29 L. Wildhaber, "Rechtsfragen des Internationalen Umweltschutzes", in: *H. Miehsler Gedächtnisvorlesungen an der Universität Salzburg*, 1/1987, 16, 17.

30 W. Erbguth, *Rechtssystematische Grundfragen des Umweltrechts*, 1987, 92 et seq.

31 R. Lagoni, "Umweltvölkerrecht-Anmerkungen zur Entwicklung eines Rechtsgebietes", in: W. Thieme (ed.), *Umweltschutz im Recht*, 1988, 244 et seq.

32 R. Wolfrum, "Purposes and Principles of International Environmental Law", *GYIL* 33 (1990), 308 et seq., (313).

main principles are the following: intergenerational equity, sustainable use, equitable use and integration.[33] Thus, as a consequence of a political evolution — involvement of developing countries — the old environmental principles have become principles with a new focus ("sustainable development").

II. Four Catalogues/Comparative Reading

In order to identify the impact of "UN-principles" on the emergence and development of International Environmental Law this section compares four catalogues of environment-related principles or concepts.

What are *"UN-principles"*? We have seen above that principles have played an important role throughout the history of the UN (UN-Charter, Friendly Relations Declaration etc.). Therefore it has to be expected that any major new area of international law is influenced by such "principles". Such principles reflect the consolidation of certain ideas, which appear to be supported not only by public opinion but also by a great number of governments.

Using the term "principles and/or concepts" means that one avoids drawing a line between them as regards their normative value and entering into the futile exercise of debating their legally-binding or compulsory nature versus their legally non-binding or simply recommendatory value. But this broad approach does not mean that we will not reflect on the legal situation of one or the other text. The value is reflected either in the contents of the principle itself or in the context in which it is enumerated (see the list of principles in the UN Framework Convention on Climate Change). The notion of "environment-related" is also deliberately chosen, because it excludes texts merely focusing on "nature" or "natural heritage" (see World Charter for Nature). This choice should be self-explanatory: "nature" has certainly been one of the points of departure for policy-making in the International Environmental Law, but "nature" would reflect a relatively narrow notion that is far too distant from notions such as environment and especially sustainable development.

"UN-principles" also means that an organ of the UN, either a conference convened by the General Assembly or a subsidiary body have approved or at least taken note of these four catalogues.[34] Hereinafter

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[33] Ph. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles", in: W. Lang, *Sustainable Development and International Law*, 1995, 54, 56, and the comments of H. Mann, 68, 70.

[34] These four texts can be found as follows:
Stockholm Declaration, *ILM* 11 (1972), 1416 et seq.
Rio Declaration, A/CONF.151/26/Rev.1 (Vol.1)

we are faced with two types of texts: political texts approved by high-level representatives (heads of state and government or ministers) — Stockholm Declaration, Rio Declaration — or texts (UNEP, CSD) emanating from selected bodies of lawyers and environmentalists, bodies which reflect, nevertheless to a large extent, the views of governments in spite of certain affirmations to the contrary. Certainly, the first two texts carry more political weight; but they have been subject to diplomatic scrutiny, they dilute important ideas and try to balance competing political-economic interests especially in the North-South dimension. They are certainly important but they do not necessarily reflect the state of international law, or the direction into which international law is moving. The other two texts emanating from expert bodies, are largely based on the political consensus achieved in the previously mentioned texts, but they try to refine thinking; they try to link lofty ideals and ideas to reality, especially when one considers their focus on implementation, compliance-control etc. Somehow one could and should distinguish between the two groups of texts by referring to the difference between *abstract/general* and *concrete/specific*.

The listing of principles/concepts hereinafter follows a relatively simple pattern:

- principles/concepts contained in all four texts usually are on the top of the list;
- below will be mentioned principles/concepts mentioned in only two or three of these texts;
- principles/concepts mentioned in one text only will be disregarded (see for example the various references in the Stockholm Declaration to "planning" or in the Rio Declaration to oppressed people etc.).

The basic reason behind this three-step approach is simple: only principles/concepts having survived 25 years, and being mentioned time and again, have a chance of entering the realm of International Environmental Law. According to the above-mentioned criteria the following list of principles/concepts is suggested:

- The principle/concept of *responsibility/liability for environmental damage*, be it domestic or transboundary (civil and/or public) is mentioned in all four catalogues; it incorporates not only the duty to compensate but also the duty to prevent such damage (Stockholm Declaration, Principle 21 and 22; Rio Declaration, Principle 2 and 13; UNEP, Principle 2; CSD, Principle 6 and 8). Taking into account that this principle/concept has been recognized as such also by arbi-

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UNEP (Washington/Nairobi), UNEP/IEL/WS/3/2.
CSD (Geneva/New York), Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995, Background Paper 3 (see also E/CN.17/1997/8).

tration (*Trail Smelter*) and the ICJ (Legality of the Threat or Use of Nuclear Weapons) we are on firm ground,[35] if we conclude that here is a text that has not only legal validity but forms already part of customary International Environmental Law.

- Another principle/concept that appears, albeit with slightly different formulations, in all four catalogues, is that of *intergenerational equity* (Stockholm Declaration, Principle 2; Rio Declaration, Principle 3; UNEP, Principle 6; CSD, Principle 5). As the focus of this text varies considerably (safeguarding of resources, link to the right to development, link to equity within generations etc.) it would still be too early to assign to it full legal value and binding force. But this principle/concept is already well beyond the realm of a political postulate. It reflects much more than aspirations.
- Language with a *human rights* flavour appears in three of the four catalogues (Stockholm Declaration, Principle 1; Rio Declaration, Principle 1; CSD, Principle 3). Although the simple reference to the "right to a healthy environment" (CSD, Principle 3) cannot be neglected, this does not yet create such a right, unless it were to be corroborated by many legally binding texts of a domestic origin (e.g. constitutions) or specific international treaties, which have spilled over into the realm of international customary law. Catalogues of human rights have to be considered with special care, because many questions of implementation still remain open.
- *Development* and the integration of environmental considerations in the development process are also mentioned in all four catalogues. This is all the less surprising as the debate on environmental protection, as soon as it had left its purely European or North American dimension, became part of a broad process of North-South negotiations. According to the interests of the respective participant either environment or development received priority attention. These references (Stockholm Declaration, Principles 8, 11, 13; Rio Declaration, Principle 3; UNEP, Principle 1; CSD, Principle 1) do not however confirm a "right to development", which has emerged in other contexts (human rights bodies). As we referred above to the interests involved, it should be understood that here we are still far from legal duties and that only political postulates are the weak underpinnings of this principle/concept. From here one single step may take us, however, to the idea of sustainable development, an idea that reflects

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35 Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq.; Case concerning the Gabcikovo-Nagymaros Project, ICJ Reports 1997, 7 et seq.; as regards the role of the Court in environmental matters see in particular the chapter "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law", in: C. Peck, R.S. Leeds (eds), *Increasing the Effectiveness of the International Court of Justice*, 1997, 397 et seq.

a political compromise, but would have important consequences for the economies of developing countries, if they decided to implement this idea.

- One of the most delicate issues is that of *common but differentiated responsibilities*, which was totally unknown at the time of the Stockholm Declaration. It grew from the special needs of developing countries (Rio Declaration, Principle 6) and was introduced as an independent principle/concept by the Rio Declaration, Principle 7; it was also recognized in the UNEP document, Principle 5 and the CSD document, Principle 10. We are certainly not faced with something of major legal value, but we have to acknowledge that several environmental treaties (Montreal Protocol on Substances that deplete the Ozone Layer, UN Framework Convention on Climate Change) have internalized this principle/ concept into their regimes. According to these treaties the duties of Parties differ according to the capacities of the Contracting States and their contribution to past environmental damage (destruction of the ozone layer, global warming). This new differentiation or positive discrimination in favour of developing countries still has to be digested by international law, which still follows the rule of sovereign equality.
- It may be surprising that issues high on the agenda of Stockholm (Principles 18, 19, 20) namely *science and technology*, *education* and *scientific research* have already been reduced to one, capacity-building, in Rio (Principle 9), and have totally disappeared from the catalogue of UNEP and CSD. This development would certainly deserve further reflection, because science and scientific research certainly remain important elements in the making and functioning of environmental policy and International Environmental Law.
- The principle/concept of *precaution*, which means action even without full scientific certainty was practically unknown at Stockholm. It emerged as the precautionary "approach" in Rio (Principle 15), was recognized as valid by the UNEP document, Principle 7, and identified as a fully fledged "principle" by the CSD document. Thus, it is a long way from any legally binding force, but it stands at the beginning of the so-called "procedural" principles/concepts which may help states and non-state actors to meet more easily their obligations of substance.
- Several other of these *procedural principles/concepts* will only be listed hereinafter:
  - effective legislation (Rio Declaration, Principle 11; CSD Principle 18)
  - monitoring compliance (CSD, Principle 19)
  - environmental impact assessment (Rio Declaration, Principle 17; CSD, Principle 15)

- access to information (CSD, Principle 14)
- public participation (Rio Declaration, Principle 10; CSD Principle 13)
- access to judicial proceedings (CSD, Principle 17).

Already this list indicates the close links between the Rio Declaration and the CSD document; this becomes especially clear if we consider the CSD-exercise as an effort to verify the implementation and further development of the Rio principles/concepts. Some of these procedural rules may be of major relevance (e.g. access of foreigners to the courts of the state of origin of a hazardous activity or an accident) as they help to avoid international responsibility; but they are not themselves yet principles of International Environmental Law.

- Of major importance in this context is also the problem of the *internalization of costs*, better known in the realm of OECD as the "polluter pays principle". This internalization of costs is not only mentioned in the Rio Declaration, Principle 16 but also in the extremely restrictive list contained in the UNEP document, Principle 8; such double quotation does not mean that we are faced with a legal duty but at least with an important element of economic thinking. The only other reference to economics in the Rio Declaration can be found in its call for a *supportive and open economic system* and its remark that trade policy measures for environmental purposes should not restrict in a discriminatory and unilateral way the free flow of goods and services. This last remark is certainly a direct outgrow of the trade and environment debate. This debate had emerged in the aftermath of the Montreal Protocol and the Tuna Cases (cf. *ILM* 30 (1991), 1594 and *ILM* 33 (1994), 839) which were decided by two GATT-panels. Again we are faced with a conflict of interests, in which each side tried to draw for support to its arguments either on the GATT (Article XX) and the new WTO-instruments or on the respective International Environmental Agreements (IEA's).
- In the follow-up to the Law of the Sea Convention and the UN Framework Convention on Climate Change at that time hotly debated principles/concepts re-emerged: either the *common heritage* of humankind (CSD, Principle 11) or the *common concern* of humankind (UNEP, Principle 3). As the distinction between the two is mainly due to a competition of interests (appropriation or not of the area to be protected) these principles/concepts are of minor importance from the view-point of general International Environmental Law.
- Not to be neglected should be the following principles/concepts: the prohibition of the use of *nuclear weapons* and *other weapons of mass destruction* (Stockholm Declaration, Principle 26). This applies in particular in the light of numerous disarmament conventions dealing with this matter (Treaty on the Non-Proliferation of Nuclear Weap-

ons; Treaty Banning Nuclear Weapons Test in the Atmosphere, in Outer Space and Under-Water; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction) and the *dictum* of ICJ concerning the use of nuclear weapons. As regards the *impact of warfare on the environment in general* only the Rio Declaration (Principle 24) contains a reference; but aside from our four catalogues and in the light of the Convention on the Prohibition of Military or any hostile Use of Environmental Modification Technologies (ENMOD) Convention, of 1977 and the provisions of Additional Protocol I to the Geneva Red Cross Convention of 1977, a customary rule of International Environmental Law is about to emerge, which prohibits at least the intentional destruction of the environment in case of armed conflict (see 2nd Gulf conflict); here it might even be advisable to speak of "ecological aggression" or "ecocide".

- Principles/concepts such as *eradication of poverty* (Rio Declaration, Principle 5; CSD, Principle 4) are certainly important but they are only political postulates and not necessarily linked to the emergence or development of International Environmental Law. This also relates to ideas such as the *sustainable use of natural resources* (CSD, Principle 7) or to *unsustainable patterns of production and consumption* (Rio Declaration, Principle 8), or to *assistance* to and *cooperation* with developing countries (Stockholm Declaration, Principle 24; Rio Declaration 27; UNEP, Principle 4). Again we are in the realm of pure politics, although these three quotations hint at a special case of the general cooperation principle as enshrined in the UN-Charter.
- The only remaining principle/concept of some legal relevance is that of *notification and information* of other states either in case of imminent disaster or of potential damage to be caused by certain planned activities. Although this duty has been mentioned in the Rio Declaration (Principles 18, 19) and certain specific conventions (e.g. on nuclear accidents), it has been neglected by the UNEP- and CSD documents. As this duty is not only important from the perspective of International Environmental Law but also relevant from a practical point of view this oversight is all the more to be regretted.

Our listing will be stopped here. Some of the catalogues contain principles/concepts which are applicable well beyond International Environmental Law, e.g. the duty to settle disputes peacefully etc. International Environmental Law is a part of international law in general; therefore such general principles/concepts do not need any separate mention.

In the next section we shall try to draw certain conclusions resulting from the comparative reading of these four sets of "UN-principles", which were adopted in diplomatic processes over 25 years. Participants

in these processes were aiming at some firm ground for a new field of international law.

III. Results of Comparative Reading/The State of International Environmental Law

International Environment Law covers two quite different domains:

Treaty law is relatively clear, as it is composed of a growing number of treaties, mainly multilateral but also some bilateral agreements. They have become part of the body of law by being processed through the channels and devices (signature, ratification/parliamentary approval etc.) envisaged by the Vienna Convention on the Law of Treaties for expressing the "consent to be bound". Its contents can be easily ascertained and identified by a simple reading of the respective texts. If they cause problems, these mainly relate to the phase of implementation. Such problems may arise, if the terms of the treaty could be interpreted in different ways, if texts remain in the ambiguous – either on purpose or as a consequence of a difference of opinions that was patched over by vague formulations or by mere negligence; it goes without saying that this latter case is relatively rare but it cannot be denied that negotiators or drafters did not foresee certain events and situations and that the lack of clarity only became clear once the text had to be applied. Nevertheless treaty law is still the more identifiable part of the two domains. *Customary law* is a body of law in constant movement and with contents and contours that are sometimes not easily distinguishable; in a young area of law such as the environment this branch may play an important role. This role can be all the more important as the evolution of the law-making process requires flexibility and the necessity of quickly adapting the law to changing circumstances. The only problem in this context is that a broad consensus of most governments is required as well as their conviction, that their practice that reflects these rules is really law and not simply a matter of convenience. The above mentioned catalogues of principles reflect to a considerable degree customary law, although they suffer from one major uncertainty. Where is the boundary between policy and law? Where is the density of political-legal statements sufficiently strong and broad in order to consider the result as a shared conviction of most governments involved, that they apply this principle as a legal duty, that they can claim the implementation of that principle from others as something owed to them or to the international community as a whole (*erga omnes* obligations)? Thus, we may conclude that customary law is a highly difficult and complex area of law.

In order to attain a minimum of transparency it may be helpful to identify three different categories of principles of a decreasing legally-binding/compulsory nature:

- principles of existing International Environmental Law
- principles of emerging International Environmental Law
- potential principles of International Environmental Law.

Among the *first group* only two of the above mentioned principles can be mentioned: the principle of *responsibility/liability* for environmental damage, be it domestic or transboundary; it has been reiterated and confirmed time and again since the *Trail Smelter* arbitration and appears in all four catalogues. Closely linked to this obligation is the *prohibition to use nuclear weapons and other weapons of mass destruction*, a principle confirmed by the above-mentioned dictum of the ICJ; this principle has been only quoted in one of the above listed catalogues; but because of its overriding importance and its close link to the aforementioned principle, its legal nature is beyond question.

Much broader is the *second group* of "emerging" principles of International Environmental Law:

- *intergenerational equity*, as a duty due to future generations;
- *right to a healthy environment* (if corroborated in human rights instruments);
- various *procedural duties* such as access to judicial proceedings, environmental impact assessment, monitoring compliance;
- duty *not to use* the environment as an *instrument of warfare*;
- *notification and information* of other states in the case of imminent disaster or of potential damage possibly caused by certain activities.

This group, due to its in-between nature, could move forward towards becoming a fully binding duty or backwards to the so-called "potential" principles, which have still to follow a certain journey in order to become a fully applicable rule of law.

This *third group* of "potential" principles is an area of hope for many policy-makers, who still count on "the rule of law" as an instrument of their endeavour:

- *development and integration* of environmental considerations into the development process;
- *common but differentiated responsibilities* — the low standing of this principle is due to its collision with the rule of sovereign equality;
- *precaution* may become a fully-fledged duty because of its close link to the aforementioned procedural duties.

To many this list may appear as too conservative and too narrow. However, we should avoid allowing political aspirations and their concretization in different catalogues of principles being understood as already

constituting International Environmental Law. The future legal value of these principles depends to a large extent on treaty-law. Are they corroborated not only in the various preambles of treaties but also fully incorporated in the very body of these conventions? Have they become part of the daily practice of contracting states when implementing those treaties? The views of non-governmental organizations and the learned opinions of experts should also be considered. Thus, we may arrive at a full understanding of the law, and especially a comprehensive insight into its customary domain at present.